

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Respondent,

-vs-

ANDREW DEAN PATTON,
Movant.

NO. CR-03-2115-WFN
CV-05-3111-WFN

ORDER

The Court entered an Order on January 5, 2006 (Ct. Rec. 195) which confirmed the Judgment filed November 8, 2004, and requested that Mr. Patton advise the Court whether he wished to proceed with either of two previously filed § 2255 Motions, one filed by Dawn Reynolds and one filed *pro se*, or whether he wished to withdraw both the initial § 2255 Motions and file a comprehensive motion. The Order was served on Mr. Patton as well as on Dawn Reynolds.

Mr. Patton timely responded with a Motion to Withdraw § 2255 Filed by Dawn M. Reynolds on 10/24/05. Motion filed 1/25/06, Ct. Rec. 196. He advised the Court that he wished to withdraw the Motion filed by Ms. Reynolds on October 24, 2005, and proceed with the Motion he filed *pro se* on December 19, 2005. That Motion to Withdraw is before the Court. In the meantime Ms. Reynolds filed a Memorandum in Support of Motion under § 2255 on February 3, 2006 (Ct. Rec. 198) and a Motion to Appoint Counsel for 2255 Motion (Ct. Rec. 197). In the Motion to Appoint Counsel, Ms. Reynolds advises the Court that she was appointed to represent Mr. Patton on appeal. She requests that she be appointed to represent him on the § 2255 Motion as well.

1 It appears to the Court that Mr. Patton has unequivocally elected to proceed with his
2 *pro se* § 2255 Motion (Ct. Rec. 194) . Therefore, Mr. Patton's Motion to Withdraw § 2255
3 Filed by Dawn M. Reynolds on 10/24/05, will be granted. Although Ms. Reynolds signs her
4 pleadings as Attorney for Andrew Patton, she has not been appointed to represent him on this
5 §2255 Motion and he has chosen to proceed *pro se*. Therefore she is not counsel of record
6 and the Court cannot consider her filings. Accordingly, the subsequent documents filed by
7 Ms. Reynolds: (1) Memorandum in Support of Motion under 28 § 2255 filed on February
8 3, 2006 (Ct. Rec. 198); and (2) Motion to Appoint Counsel for 2255 Motion, filed on
9 February 3, 2006 (Ct. Rec. 197) will be stricken. The Court would also note that it would not
10 be inclined to appoint counsel on this Motion unless an evidentiary hearing is required. Rule
11 8(c), RULES-SECTION 2255 PROCEEDINGS (West 2005).

12 Having determined which § 2255 Motion is before the Court, the Court made proceed
13 to evaluate the *pro se* Motion filed by Mr. Patton (Ct. Rec. 194).

14 BACKGROUND

15 Mr. Patton was indicted July 8, 2003 with a co-Defendant, William Scribner (CR-03-
16 2116-WFN), on one count of possession of a listed chemical (pseudoephedrine) with intent
17 to manufacture a controlled substance (methamphetamine) in violation of 21 U.S.C.
18 § 841(c)(1) (Ct. Rec. 12). Mr. Patton was represented by appointed counsel Tim Cotterell.
19 A jury found Mr. Patton guilty as charged with an additional finding that there were 504
20 grams of pseudoephedrine (Ct. Rec. 148). Mr. Patton was sentenced on November 4, 2004,
21 to 168 months incarceration and three years of supervised release (Ct. Rec. 157). The Court
22 sentenced Mr. Patton under the then mandatory Guidelines.

23 Mr. Patton appealed his conviction and sentence (Ct. Rec. 160). On a limited remand
24 from the Ninth Circuit Court of Appeals, the Court found there was no reasonable possibility
25 that the sentence imposed in this case would have been materially different had the Court
26 known that the Sentencing Guidelines were advisory rather than mandatory (Ct. Rec. 195).

DISCUSSION

Mr. Patton's § 2255 Motion presents three grounds for relief: (1) trial counsel was ineffective under the Sixth Amendment; (2) the prosecutor engaged in misconduct that violated Mr. Patton's Fifth Amendment due process rights; and (3) the trial court abused its discretion for failing to dismiss the case based upon insufficient evidence. The statute provides that only if the Motion, file and records "conclusively show that the movant is entitled to no relief" may the Court summarily dismiss the Motion without sending it to the United States Attorney for response. 28 U.S.C. § 2255 (West 2005). The Rules regarding Section 2255 Proceedings similarly state that the Court may summarily order dismissal of a 2255 motion without service upon the United States Attorney only "if it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court." Rule 4(a), RULES-SECTION 2255 PROCEEDINGS (West 2005). Thus, when a movant fails to state a claim upon which relief can be granted or when the motion is incredible or patently frivolous, the district court may summarily dismiss the motion. *Cf. United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989); *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir. 1985).

The Court has reviewed the file and the Motion submitted by Mr. Patton and the Court cannot say that the Motion is patently frivolous. Accordingly,

IT IS ORDERED

1. Mr. Patton's "Motion to Withdraw § 2255 Filed by Dawn M. Reynolds on 10/24/05", which was filed January 25, 2006, **Ct. Rec. 196**, is **GRANTED**. The Motion Under 28 § 2255, filed October 24, 2005, **Ct. Rec. 189**, is **WITHDRAWN**. The corresponding case **CV-05-3100-WFN** shall be **CLOSED**.

2. Documents filed by Ms. Reynolds: (1) Memorandum in Support of Motion under 28 § 2255, on February 3, 2006, **Ct. Rec. 198**; and (2) Motion to Appoint Counsel for 2255 Motion, filed February 3, 2006, **Ct. Rec. 197**, are **STRICKEN**.

1 3. The Motion for Leave to Proceed In Forma Pauperis by Andrew Dean Patton, filed
2 October 24, 2005, **Ct. Rec. 190**, is **GRANTED**. Mr. Patton may proceed without payment
3 of filing fees.

4 4. Notice shall be served upon the United States to answer Movant's § 2255 Motion
5 (Ct. Rec. 194) by **April 5, 2006**. The contents of the answer shall conform to the
6 requirements of Rule 5(a) of the Rules-Section 2255 Proceedings.

7 5. Movant shall serve and file a reply to United States answer, if any, within thirty
8 (30) days of service of United States' answer.

9 6. If Movant raises new issues in his reply, the Government may respond to those
10 issues in a supplemental response to be filed and served within 20 days of service of the
11 Movant's reply.

12 7. The Court will take the matter under advisement when the briefing is complete.

13 8. Movant shall serve upon the United States Attorney a copy of every further
14 pleading or document submitted for consideration by the Court. He shall include with the
15 original paper to be filed with the District Court Executive, a certificate stating the date a true
16 and correct copy of any document was mailed to the United States. The Movant shall also
17 supply to the District Court Executive a copy for the Judge of all filings. Local Rule 5.1(a).
18 **Any paper received by a District Court Judge which has not been filed with the District**
19 **Court Executive or which fails to include a certificate of service will be disregarded by**
20 **the Court.** Movant is also advised that throughout this action he must notify the District
21 Court Executive regarding any change of address.

22 The District Court Executive is directed to:

23 (a) File this Order;

24 (b) Provide copies to Assistant United States Attorney James Hagarty; Dawn Marie
25 Reynolds, 274 SE Oak St., Dallas, Oregon 97338; and to Andrew Patton, #15873-085, FCI
26 Sheridan, Post Office Box 8000, Sheridan, Oregon 97378-9601;

1 (c) Provide Mr. Hagarty with a copy of the § 2255 Motion (Ct. Rec. 194); and

2 (d) Set a **CASE MANAGEMENT DEADLINE for June 1, 2006.**

3 The District Court Executive is directed to file this Order and provide copies to counsel.

4 **DATED** this 9th day of February, 2006.

5
6 s/ Wm. Fremming Nielsen

WM. FREMMING NIELSEN

7 02-09 SENIOR UNITED STATES DISTRICT JUDGE